

REMARKS

Claims 1 through 23 are currently pending in the application.

This amendment is in response to the Office Action of April 13, 2004.

35 U.S.C. § 101 Double Patenting Rejection

Claims 13 through 23 are rejected under 35 U.S.C. § 101 as claiming the same invention as that of claims 15 through 23, 25 and 26, respectively, of prior U.S. Patent 6,630,781 (hereinafter referred to as the '781 patent). Applicants respectfully traverse this rejection, as hereinafter set forth.

Applicants assert that a reliable test for statutory double patenting under 35 U.S.C. § 101 is whether a claim in the application could be literally infringed without literally infringing a corresponding claim in the patent. Is there an embodiment of the invention that falls within the scope of one claim, but not the other? If there is such an embodiment of the invention, then identical subject matter is not defined by both claims and statutory double patenting does not exist. *In re Vogel*, 422 F.2d 438, 164 USPQ 619 9CCPA 1970).

Applicants assert that statutory double patenting under 35 U.S.C § 101 does not exist between the embodiment of the invention set forth in presently amended independent claim 13 of the present application and the embodiment set forth in independent claim 15 of the '781 patent because different embodiments of the inventions are being claimed. For instance, the embodiment of the invention set forth in presently amended independent claim 12 of the present application clearly sets forth an element of the invention calling for "a focusing electrode including a layer of conductive material" whereas the embodiment of the invention set forth in corresponding independent claim 15 of the '781 patent does not. Therefore, different embodiments of the inventions are being claimed between the embodiment of the invention set forth in presently independent claim 13 of the present application and the embodiment of the invention set forth in corresponding independent claim 15 of the '781 patent. Accordingly, presently amended independent claim 13 of the application is allowable as well as dependent claims 14 through 23 therefrom under 35 U.S.C. § 101.

Double Patenting Rejection Based on U.S. Patent 6,630,781


Claims 1 through 12 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1 through 10, 12 and 13 of U.S. Patent 6,630,781.

Claims 1, 3 through 6 and 13 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 17 through 20 of U.S. Patent 6,630,781.

In order to avoid further expenses and time delay, Applicants elect to expedite the prosecution of the present application by filing a terminal disclaimer to obviate the double patenting rejections in compliance with 37 C.F.R. §1.321 (b) and (c). Applicants' filing of the terminal disclaimer should not be construed as acquiescence of the Examiner's double patenting or obviousness-type double patenting rejection. Attached is the terminal disclaimer and accompanying fee.

Applicants request the allowance of claims 1 through 23 and the case passed for issue.

Respectfully submitted,



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